V. GOPAL, RE: EX P; BANK BURUH (M) BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[IN BANKRUPTCY NO. 384 OF 1984]
28 NOVEMBER 1985

BANKRUPTCY: *Bankruptcy Act 1967 - Section 3(1)(i) - Bankruptcy notice caused to be issued a few days before 6 years had lapsed from date of relevant final judgment which notice was only served a few days after 6 years had lapsed - Whether in the circumstances an act of bankruptcy said to have been committed - Rules of the High Court 1980 - Order 46 r. 2(1)(a) - Whether a writ of execution to enforce a judgment or order may issue without leave of the Court where 6 years or more have lapsed - Relevant date - Whether date of issue of bankruptcy notice or date of service of the notice - Whether an act of bankruptcy had been committed.*

By s. 3(1)(i) of the Bankruptcy Act 1967 a debtor commits an act of bankruptcy if a creditor had obtained a final judgment against him for any amount and execution thereon not having been stayed has served on him ... a bankruptcy notice ... and he has failed to comply with the requirements of that notice within 7 days of it being served on him.

The question that arose in this matter is whether an act of bankruptcy could be said to have been committed where s. 3(1)(i) was relied on but where the bankruptcy notice was caused to be issued a few days before 6 years had lapsed from the date of the relevant final judgment which notice was only served a few days after 6 years had lapsed.

By O. 46 r. 2(1)(a) of the Rules of the High Court 1980 a writ of execution to enforce a judgment or order may not issue without leave of the Court where 6 years or more have lapsed since the date of the judgment or order.

Held:

[1] On the date that the bankruptcy notice was served on the debtor the creditor did not have a judgment on which execution could be proceeded with since to do so, by O. 46 r. 2(1)(a) leave of Court had first to be obtained and that therefore on that date the creditor did not have a final judgment within the meaning of s. 3(1)(i).

[2] On the day that the bankruptcy notice was served, since 6 years had lapsed from the date of the judgment the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as prescribed by O. 46 r. 2(1)(a).

[3] The relevant date is the date of the bankruptcy notice and not the date of the issue of the notice. The service of the bankruptcy notice followed by the non-compliance of it results in an act of bankruptcy having been committed on which a petition may be founded. It is the filing of the petition that commences the bankruptcy proceedings.

[4] In the instant case, the petition is founded on what does not amount to an act of bankruptcy and accordingly the petition has to be and is dismissed with costs.

[Petition dismissed with costs.]

Cases referred to:

Ex parte IDE [1886] 17 QBD 755
Ex parte Woodall 13 QBD 479
In Re A Bankruptcy Notice [1898] 1 QB 383
In Re A Company [1915] 1 Ch. 520
In Re Silber [1915] 2 KB 317

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Bankruptcy Act 1914 [UK], s. 4(1)(g)
Rules of the High Court 1980, O. 46 r. 2(1)(a)

For the Judgment debtor - M.S. Murthi; M/s. Murthi & Partners
For the petitioner - Kumar Kanagasingam; M/s. Nik Hussain, Ibrahim & Abdullah

JUDGMENT

VC George J:
(On encl. (8))

By s. 3(1)(i) of the Bankruptcy Act 1967 a debtor commits an act of bankruptcy if a creditor has obtained a final judgment against him for any amount and execution thereon not having been stayed has served on him ... a bankruptcy notice ... and he has failed to comply with the requirements of that notice within 7 days of it being served on him.

There is a proviso to s. 3(1)(i):

> Provided that for the purposes of this paragraph and of s. 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order.

The question that arose in this matter is whether an act of bankruptcy could be said to have been committed where s. 3(1)(i) was relied on but where the bankruptcy notice was caused to be issued a few days before 6 years had lapsed from the date of the relevant final judgment which notice was only served a few days after 6 years had lapsed.

By O. 46 r. 2(1)(a) of the Rules of the High Court a writ of execution to enforce a judgment or order may not issue without leave of the Court where six years or more have lapsed since the date of the judgment or order.

In the judgment of the English Court of Appeal in *Ex parte* IDE [1886] 17 QBD 755 it was held that when a creditor has obtained judgment against a firm but has not obtained the requisite leave of Court to issue execution against a person alleged to be a member of the firm, he cannot effectively serve such a person with a bankruptcy notice. Section 4(1)(g) of the relevant English Bankruptcy Act is in *pari materia* with our s. 3(1)(i). Lord Esher MR said at p. 759 of the report,

> It is true that in the present case execution on the judgment has not been stayed, but the words seem to me necessarily to imply that the judgment must be one upon which execution could go immediately, unless it was stayed. But here execution cannot go immediately whether it is stayed or not; it cannot go without the leave of the Court.

In the same case Fry LJ at p. 760 referred to what Lindley LJ had said in an earlier decision of the Court of Appeal *Ex parte Woodall* 13 QBD 479 @ 483:

> The words 'execution thereon not having been stayed' shew clearly what sort of a creditor is intended. It must be a creditor who is in a position to issue execution on the judgment;...

Fry LJ in agreeing with the view of Lindley LJ went on to say,

> It would be very strange if the enactment were that a bankruptcy notice could not be issued when execution on the judgment had been stayed, and yet that a bankruptcy notice could be issued when execution could not go at all without the leave of the Court, and the proceedings had not been stayed simply for that reason.

The principle expressed in those two English cases equally apply in the instant case. On the date that the bankruptcy notice was served on the debtor the creditor did not have a judgment on which execution could be proceeded with since to do so, by O. 46 r. 2(1)(a) leave of Court had first to be obtained and that therefore on that date the creditor did not have a final judgment within the meaning of s. 3(1)(i).

Encik Kumar Kanagasingam argues that bankruptcy proceedings are not execution proceedings. That is indeed so. We had to go no further to see that than to read the three cases cited by Encik Kanagasingam, namely, In *re A Bankruptcy Notice* [1898] 1 QB 383, In *re a Company* [1915] 1 Ch. 520 and In *re Silber* [1915] 2 KB 317. What Lord Cozens-Hardy MR said at p. 525 in In re A *Company* (*supra*) refers to a winding-up petition. What was said there could apply equally to a bankruptcy petition. What he said was:

> ... Now 'execution on the judgment' is a technical term. It is a legal process by which the judgment creditor, in that character and for his sole benefit, by a proceeding in the same action seeks to satisfy his judgment wholly or partially. I think it is plain that a winding-up petition is not execution on a judgment. It lacks almost every element of such an execution ...

In *re A Bankruptcy Notice* (*supra*) Chitty LJ said at p. 386,

> ... The issuing of a bankruptcy notice is clearly not a process of execution upon the judgment ...

and at p. 387, Collin LJ said,

> ... It would be impossible to argue that the issue of a bankruptcy notice is a form of execution ...

However, that is no answer to the application of s. 3(1)(i) to decide whether the creditor had on the day the bankruptcy notice was served a final judgment within the meaning of the said subsection without which the bankruptcy notice would be bad.

What the proviso to s. 3(1)(i) does is to define a creditor who has obtained a final judgment or final order within the meaning of that section as being "any person who is for the time being entitled to enforce a final judgment or final order". On the day that the bankruptcy notice was served, since six years had lapsed from the date of the judgment the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as prescribed by O. 46 r. 2(1)(a).

Encik Kanagasingam's other contention was that the relevant date is the date of the issue of the bankruptcy notice and not the date of service of the notice. He contended that the bankruptcy proceedings commenced on the issue of the notice. I disagree. The service of the bankruptcy notice followed by the non-compliance of it results in an act of bankruptcy having been committed on which a petition may be founded. It is the filing of the petition that commences the bankruptcy proceedings.

In the instant case, the petition is founded on what does not amount to an act of bankruptcy and accordingly the petition has to be and is dismissed with costs.

Also found at [1987] 1 CLJ 602